Mohd Nizar Fakhri bin Badri v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–384 OF 2010
RAMLY ALI, SYED AHMAD HELMY AND APANDI ALI JJCA
23 DECEMBER 2011

Criminal Procedure — Trafficking in dangerous drugs — Whether case proved beyond reasonable doubt — Whether trial court correct in its findings at all stages of trial

The appellant was convicted and sentenced to death by the High Court for trafficking in 4,300g cannabis contrary to s 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). He appealed to the Court of Appeal against conviction and sentence on the grounds, inter alia, the trial judge had wrongly concluded he had knowledge of the drugs which were in a red bag he was carrying at the time of his arrest by a police party; that the presumption of trafficking under s 37(da)(vi) of the DDA was wrongly invoked against him and that there had been a failure to consider that the evidence adduced by the defence had rebutted the prosecution's case.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) It was undisputed that at the material time the appellant was carrying a red bag which he threw down when approached by the police; that he then tried to run away but was apprehended after a struggle; that the bag was found to contain the cannabis and that the mouth of the bag was open. Based on these facts the trial judge was right to infer the appellant had knowledge of the drugs (see para 10).

(2) Since the appellant was in control and possession of the drugs which weighed very much in excess of 200g, the presumption of trafficking was rightly invoked against him (see para 12).

(3) The High Court was correct in finding at the end of the prosecution's case that a prima facie case had been established and in calling upon the appellant to enter his defence. The trial judge had also properly and adequately considered the defence evidence and correctly came to the conclusion the accused had failed to cast a reasonable doubt on the prosecution's case (see para 16(a) & (b)).

[Bahasa Malaysia summary

Perayu disabitkan dan dihukum mati oleh Mahkamah Tinggi kerana mengedar dadah kanabis sebanyak 4,300g bertentangan s 39B(1)(a) Akta Dadah

Berbahaya 1952 ('ADB'). Dia merayu ke Mahkamah Rayuan terhadap sabitan dan hukuman atas alasan, antara lain, hakim perbicaraan telah tersalah apabila beliau memutuskan yang dia mempunyai pengetahuan mengenai dadah tersebut yang mana berada di dalam beg merah yang digalasnya pada masa penangkapan dia oleh polis; bahawa anggapan pengedaran di bawah s 37(da)(vi) ADB salah dibangkitkan terhadap dia dan bahawa terdapat kegagalan untuk mempertimbangkan bahawa keterangan yang dikemukakan oleh pembelaan telah mematahkan kes pihak pendakwaan.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Ia tidak dipertikaikan bahawa pada masa material perayu menggalas beg merah yang dibuangnya apabila didekati oleh polis; bahawa dia kemudiannya cuba untuk melarikan diri tetapi ditangkap selepas pergelutan; bahawa beg didapati mengandungi kanabis dan bahawa bahagian atas beg terbuka. Berdasarkan fakta ini hakim perbicaraan adalah betul untuk menyatakan yang perayu mempunyai pengetahuan mengenai dadah (lihat perenggan 10).

(2) Memandangkan perayu mempunyai kawalan dan milikan dadah tersebut yang beratnya melebihi 200g, anggapan pengedaran adalah dibangkitkan secara betul terhadap dia (lihat perenggan 12).

(3) Mahkamah Tinggi adalah betul dalam mendapati pada akhir kes pihak pendakwaan bahawa kes prima facie telah dibuktikan dan dalam memanggil perayu untuk memasuki pembelaannya. Hakim perbicaraan juga telah mempertimbangkan dengan betul dan wajar keterangan pembelaan tersebut dan telah dengan betul mencapai keputusan yang tertuduh gagal untuk membangkitkan keraguan munasabah ke atas kes pihak pendakwaan (lihat perenggan 16(a) & (b)).]

Notes

For a case on proof of case beyond reasonable doubt, see 5(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 5079.

Cases referred to

Chan Pean Leon v PP [1956] 1 MLJ 237; [1956] 1 LNS 17 (refd)
Hoh Bon Tong v PP [2010] 5 CLJ 240, CA (refd)
Lee Kwan Woh v PP [2008] 3 MLJ 674; [2008] 4 CLJ 133, CA (refd)
Ong Ah Chuan v PP, Koh Chai Cheng v PP [1981] 1 MLJ 64, PC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
Tong Peng Hong v PP [1955] MLJ 232 (refd)

Appeal from: Criminal Trial No MT3-40 of 2008 (High Court, Johor Bharu)

Legislation referred to

Criminal Procedure Code s 182A
Dangerous Drugs Act 1952 ss 2, 37(da)(vi), 39B(1)(a)
Evidence Act 1950 s 8(2)

Rosli Kamaruddin (Rosli Kamaruddin & Co) for the appellant.
Mohamad Abazafree bin Mohamad Abbas (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Apandi Ali JCA:

INTRODUCTION

[1] The appellant was convicted and sentenced to death for an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952. The charge against the appellant at the Johor Bahru High Court reads as follows:

> Bahawa kamu pada 12.4.2006 jam lebih kurang 6.00 petang, di tempat letak kereta Masjid Jamek, Taman Cendana, Pasir Gudang, di dalam daerah Johor Bahru, dalam Negeri Johor, telah mengedar dadah berbahaya jenis Cannabis berat bersih 4300 gram dan dengan itu kamu telah melakukan kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 ('the Act') dan boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

[2] The appellant appealed against his conviction and sentence. On appeal, this court dismissed his appeal and affirmed the conviction and sentence imposed by the High Court.

[3] The facts of the case are well set out in the judgment of the High Court and we do not propose to repeat them here.

[4] From the facts of the case, most of the legal issues arising therein are trite law. Nevertheless we shall deal with the contentions raised by the appellant at the hearing of his appeal.

CONTENTIONS BY THE APPELLANT

[5] Basically learned counsel for the appellant raised four grounds in support of his appeal. The grounds as listed in grounds No 3–6 in the petition of appeal, are as follows:

The first ground

[6] That the learned trial judge erred when he inferred the element of

knowledge of the drugs found, namely by the manner the drugs were found and the conduct of the appellant at the time of arrest.

[7] On this issue, the undisputed fact is that at the material time and place the appellant was carrying a red bag and upon being approached by the police ambush party, and after the police identified themselves, the appellant threw the bag down and tried to run away. The appellant ran for about 30 meters before he could be apprehended. In the course of the apprehension and arrest there was a struggle, whereby one of the police officers was injured. Upon examination of the bag, it was found to contain five slabs of cannabis. The five slabs were packed in transparent plastic wrappings (*plastik lutsinar*) and the mouth of the bag was open. Based on the above facts we agree with the trial judge's findings by way of inference of the knowledge of the drugs by the appellant (see cases of *Tong Peng Hong v Public Prosecutor* [1955] MLJ 232; *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237; [1956] 1 LNS 17 and *Lee Kwan Woh v Public Prosecutor* [2008] 3 MLJ 674; [2008] 4 CLJ 133.

[8] On the evidence of conduct of the appellant at the time of arrest, which is admissible under s 8(2) of the Evidence Act 1950, is also a very strong inference of knowledge (see *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717 and *Hoh Bon Tong v Public Prosecutor* [2010] 5 CLJ 240.)

[9] As such we cannot find any error by the learned trial judge in inferring knowledge from the above set of facts and circumstances of this case.

The second ground

[10] That the learned trial judge erred in invoking the presumption under s 37(da)(vi) of the Dangerous Drugs Trafficking 1952 against the appellant. This issue is related to the first issue above. From the same undisputed facts, it is evidentially correct to conclude that the appellant was in control and possession of the drugs found in the red bag. Since the drugs that were in the possession of the appellant, which was later ascertained to be cannabis, and was established to weigh very much in excess of the 200g, it is obvious that the presumption under s 37(da)(vi) shall be triggered. This is trite law and we cannot find any error by the learned trial judge, in doing so.

The third ground

[11] That the learned trial judge erred in applying the principles in *Ong Ah Chuan v Public Prosecutor, Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 without distinguishing the facts of that case and in this appeal.

[12] Upon perusal of the grounds of judgment of the learned trial judge, we

find that the reference to *Ong Ah Chuans'* was a matter of completeness of the consideration of all the facts of the case, at the end of the prosecution's case. This can be seen in the judge's findings at para 7 of his grounds of judgment and the basis of calling for the defence is after invoking the presumption of trafficking (this is reflected in sub-para (f) of the said para 7 of the learned judge's grounds of judgment). Para 7(f) reads as follows:

> (f) Memandangkan jumlah berat bersih cannabis yang menjadi hal perkara pertuduhan ialah 4300g, iaitu bersamaan 21.5 kali ganda berat minima bagi menimbulkan anggapan statutori pengedaran, maka anggapan di bawah s 37(da)(vi) ADB 1952 adalah terpakai. Tertuduh adalah dianggap mengedar dadah tersebut sehingga dibuktikan sebaliknya (lihat kes *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 8 CLJ 814).

[13] Nevertheless the reference to *Ong Ah Chuans'* is not wrong either as it refers to the principle that any person found to be in possession of a large quantity of drugs (as in this case) the inference is that such possession, unless proven to be for self-consumption, is for purposes of trafficking. That principle is applicable to any fact of any case where the activities of an accused falls under anyone of the many acts as defined under 'trafficking' in s 2 of the Act, which, inter alia, includes 'carrying'. On this issue, it is our judgment, the contention by the appellant has no merits.

The fourth ground

[14] That the learned trial judge had erred in failing to consider that the defence evidence had rebutted the prosecution's case.

[15] On this issue, we find that the learned trial judge had considered all the defence evidence, namely that the appellant was an innocent carrier of the bag without any knowledge of its contents. The learned trial judge had used the correct burden of proof in evaluating the defence story for purposes of rebutting the presumption against the appellant. In considering the defence, the learned trial judge had also, correctly tested it against the evidence adduced by the prosecution. We find that the learned trial judge in his grounds of judgment, had correctly followed to the letter the procedure at the conclusion of the trial, as mandated by s 182A of the Criminal Procedure Code. He had made findings of facts based on all the evidence adduced before the court. It is thus, also our judgment that the appellant's contention in his last ground is without merits.

FINDINGS AND CONCLUSION

[16] Having examined the evidence before us, we hold that:

(a) the High Court was correct in arriving at its findings, at the end of the

prosecution's case, that the prosecution had established a prima facie case and in calling the appellant to enter on his defence; and

(b) the defence was properly and adequately considered by the trial judge who correctly came to the conclusion that the appellant failed to cast any reasonable doubt on the prosecution's case.

[17] We have examined all the evidence before us and we find that the evidence against the appellant is overwhelming. In that light we find that the trial court had come to a correct conclusion and thus we find no reason to disturb the decision and we also conclude that the conviction is obviously safe.

[18] For the above reasons, we unanimously dismissed the appeal by the appellant. The conviction and sentence by the High Court is therefore affirmed.

Appeal dismissed and conviction and sentence affirmed.

Reported by Ashok Kumar